IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 16, 2009

VANDERBILT UNIVERSITY v. KAFIRISTAN BLOKES PARTNERSHIP d/b/a THE PRINCETON REVIEW OF TENNESSEE, ET AL.

Appeal from the Circuit Court for Davidson County
No. 05C-2025 Barbara N. Haynes, Judge

No. M2008-01568-COA-R3-CV - Filed September 15, 2009

Lessee appeals the trial court's finding on summary judgment that lessor did not violate a provision in their lease whereby lessor agreed to work with lessee to develop acceptable exterior signage. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Thomas Nebel, Nashville, Tennessee, for the appellants Kafiristan Blokes Partnership, d/b/a The Princeton Review of Tennessee, and F. Wade McKinney, Individually and d/b/a The Princeton Review of Tennessee.

John L. Whitfield, Jr., Nashville, Tennessee; William F. Long, Jr., Brentwood, Tennessee, for the appellee, Vanderbilt University.

OPINION

Vanderbilt University ("Vanderbilt") leased office space in the Baker Building next to the university campus to Wade McKinney and Kafiristan Blokes Partnership, d/b/a The Princeton Review of Tennessee (collectively "Lessee") beginning May 15, 1998. Following amendment, the lease term was for seven (7) years.

In April of 2005, Vanderbilt sued Lessee in General Sessions Court to recover unpaid rent, plus interest and attorney's fees. The case was removed to Circuit Court on June 28, 2005. Lessee counterclaimed alleging that Vanderbilt breached the provision of the lease governing the type of signage Lessee could have on the exterior of the building where Lessee leased space.

The trial court granted Vanderbilt summary judgment, finding that Lessee breached the lease and awarding Vanderbilt $12,692.34. This finding is not appealed. The trial court also found that Vanderbilt was not in breach of the provision governing exterior signage, and, even if there had been a breach, the damages were too speculative to support an award. Lessee appealed the trial court's finding on the exterior signage issue.

I. SUMMARY JUDGMENT

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Id.* Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co.*, *Inc*., 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004).

The moving party has the burden of demonstrating it is entitled to judgment as a matter of law and that there are no material facts in dispute. *Martin*, 271 S.W.3d at 83. To be entitled to summary judgment, a defendant moving party must either (1) affirmatively negate an essential element of the non-moving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 9 (Tenn. 2008). If the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. *Martin*, 271 S.W.3d at 84; *Hannan*, 270 S.W.3d at 5; *Staples v. CBL & Associates*, 15 S.W.3d 83, 86 (Tenn. 2000) (citing *Byrd v. Hall*, 847 S.W.2d at 215).

II. CONSTRUCTION OF CONTRACTS

Most of the issues raised by the parties on appeal pertain to the trial court's interpretation of the provision in the lease governing exterior signage. The question of interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc*, 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, the trial court's interpretation of a contractual document is not entitled to a presumption of correctness on appeal. *Allstate Insurance Company v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). This court must review the document ourselves and make our own determination regarding its meaning and legal import. *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

Our review is governed by well-settled principles. "The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The court's role in resolving disputes regarding the interpretation of a contract is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used. *Allstate Ins. Co.*, 195 S.W.3d at 611; *Staubach Retail Services - Southeast LLC v. H.G. Hill Realty Co.*, 160

S.W.3d 521, 526 (Tenn. 2005); *Guiliano*, 995 S.W.2d at 95; *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth Inc*., 521 S.W.2d 578, 580 (Tenn. 1975).

In construing the contract, the court is to determine whether the language is ambiguous. *Allstate Ins. Co.*, 195 S.W.3d at 611; *Planters Gin Co.*, 78 S.W.3d at 890. If the language in the contract is clear and unambiguous, then the "literal meaning controls the outcome of the dispute." *Allstate Ins. Co.*, 195 S.W.3d at 611; *City of Cookeville, Tn. v. Cookeville Regional Med. Ctr.*, 126 S.W.3d 897, 903 (Tenn. 2004); *Planters Gin Co.*, 78 S.W.3d at 890. "A contract term is not ambiguous merely because the parties to the contract may interpret the term in different ways." *Staubach*, 160 S.W.3d at 526.

III. ANALYSIS

The provision in the lease governing exterior signage is as follows:[1]

> SIGNAGE. Landlord agrees to work with tenant to develop acceptable interior (lobby) and exterior (front of building on 21st avenue) signage.

The trial court found in its order granting summary judgment that the failure of the parties to agree on exterior signage was not a breach of the lease by Vanderbilt.[2]

It is clear that failure by the parties to reach an agreement does not violate the exterior signage provision. Vanderbilt simply agreed to "work with tenant to develop acceptable . . . exterior (front of building on 21st Avenue) signage." There are no parameters on what would constitute "acceptable" exterior signage.

The question is whether Vanderbilt submitted proof to negate an essential element of plaintiff's claim, *i.e.*, did Vanderbilt "work with tenant" to develop exterior signage. The Statement of Undisputed Facts agreed upon by the parties provides that "at least three different exterior signage proposals were discussed by the parties." Furthermore, Lessee's brief on appeal states that personnel from Vanderbilt met with Lessee about exterior signage, commented on proposals from Lessee, and,

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[1] There were apparently two leases signed by the parties containing slightly different exterior signage language. The provisions are identical except that the other lease does not contain the phrase "(front of building on 21st avenue)." Although the result is the same under either provision, the parties appear to agree in the Statement of Undisputed Facts that the provision quoted above governs.

[2] Defendant argues that since Vanderbilt moved for summary judgment based on the speculative damage issue assuming that Vanderbilt was in breach, the trial court erred in granting summary judgment based on its finding that Vanderbilt was not in breach. According to Lessee, since it had no notice that Vanderbilt's breach was at issue it had no opportunity to respond to the issue of breach. However, it is apparent both from Lessee's response to Vanderbilt's summary judgment motion and Mr. McKinney's affidavit filed in response that Lessee was vigorously arguing and submitting evidence to support Lessee's contention that Vanderbilt was in breach. Consequently, Lessee was on notice that whether Vanderbilt was in breach was at issue.

according to Lessee, "pushed" Lessee to accept using vinyl lettering on the office space windows.

Vanderbilt produced evidence that it worked with Lessee to develop outside signage. In response, Lessee argued before the trial court that under the signage provision at issue Vanderbilt should have agreed with Lessee's proposals and, even, that Vanderbilt should have honored its agreement to provide signage.[3] Lessee did not maintain that Vanderbilt failed to respond to Lessee's signage proposals, only that Vanderbilt failed to agree with them. Lessee failed to create an issue of fact as to whether Vanderbilt "worked with" Lessee to develop acceptable signage.

Based on these undisputed facts, we agree with the trial court that Vanderbilt did not breach its agreement to "work with tenant" to develop exterior signage. The grant of summary judgment to Vanderbilt is affirmed. Since we find that Vanderbilt did not breach the lease, any issue regarding whether damages for any such non-existent breach are speculative is pretermitted.

The trial court is affirmed. Costs of this appeal are taxed against Wade McKinney and Kafiristan Blokes Partnership, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.

[3] The lease provided in another provision that Lessee is to pay for signage.